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Nos. 93-517, 93-527, 93-539

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioners,

v.

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

On Writ of Certiorari to the
New York Court of Appeals

BRIEF OF NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AND JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

The National Council of Churches of Christ in the U.S.A. is a community of thirty-two Protestant and Eastern Orthodox communions having an aggregate membership in the United States of over forty million. Its positions on public issues are taken on the basis of policies developed by its General Board, composed of some two hundred and fifty members selected by its member communions in proportion to their size and support of the Council. This brief implements the Council's longstanding commitment to separation of religious and political authority and to protecting religious liberty from burdensome or discriminatory regulation.

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 2,856,713 members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

This brief is consistent with the policies adopted by the General Assembly regarding the Establishment Clause of the First Amendment. The 200th General Assembly of the Presbyterian Church (U.S.A.) addressed these issues in 1988: "We reject and oppose any attempts on the part of the church to exercise political authority . . ." Presbyterian Church (U.S.A.), *God Alone Is Lord of the Conscience*, A Policy Statement Adopted by the General Assembly 52 (1988). Creation of the Kiryas Joel Village School District as a governing entity violates this principle.

But this does not mean that government cannot aid the disabled children of Kiryas Joel:

> Government payments on behalf of individuals, under programs such as Medicare, Medicaid, and scholarship assistance, should without exception be available to clients and students at church-sponsored agencies and institutions on exactly the same terms as if those patients or clients were receiving their services from secular entities. . . . Where government provides noncurricular services to both public and private schools that involve the itineration of public employees to the institutions, schools sponsored by religious organizations should not be excluded.

Id. at 31-32.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

SUMMARY OF ARGUMENT

This case involves a deliberate and successful effort to confer governmental power on a religious community, and the resulting combination of religious and governmental power violates the core of the Establishment Clause. But the Satmar Hasidim's legitimate need for accommodation can be fully met by providing publicly funded services for disabled children at a site off the campus of the Satmar's private religious school. On these two points, we adopt by reference parts I, II, III, and VI of the brief of the American Jewish Congress *et al.* as Amici Curiae.

We file separately from the American Jewish Congress brief so that we may address the parties' dispute over the *Lemon* test and the endorsement test. The second prong of the *Lemon* test originated in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), as an attempt to elaborate the requirement of government neutrality toward religion. The *Schempp-Lemon* formulation had the unintended consequence of disaggregating the neutrality inquiry into two separate inquiries: Has government advanced religion? And, has government inhibited religion? This disaggregation suggests that there is a constitutional violation anytime a policy may be said to advance religion, even if the only alternative policy would severely inhibit religion. It is this disaggregation of the neutrality inquiry that leads petitioners, and some lower courts, to conclude that the *Lemon* test prohibits any effort to accommodate the needs of religious minorities, or even that it requires government to discriminate against observant religious believers.

This Court has never misunderstood the *Schempp-Lemon* test in this way. The Court has held in many

contexts that government does not establish religion by eliminating governmentally imposed burdens on religious observance, and that discrimination against religious minorities is not required and is often forbidden.

What is needed to resolve the difficulties raised by petitioners is to clarify the second prong of the *Lemon* test to restate the Court's original intention: the goal is government neutrality toward religion. The search for neutrality requires that any effects of a policy that tend to advance religion be compared to any effects of alternative policies that tend to inhibit religion. It is rarely possible for government to achieve absolutely no effect on religion. The best government can do is to minimize its effects on religion; more specifically, government should minimize the extent to which it either encourages or discourages religious belief or practice.

The *Lemon* test would benefit from this clarification. But the underlying requirement that government be neutral toward religion is essential to religious liberty; it is critical that the Court not cast any doubt on that basic requirement.

The endorsement test requires similar clarification. The endorsement test is essential in cases involving government speech or symbolic conduct; in those cases, endorsement goes to the heart of the issue. But it is misleading to extend the endorsement test to government policies with more tangible consequences. If government policy has tangible consequences, and if those consequences come as close to neutrality as it is possible to come, then the policy is constitutional and courts should not speculate about implicit or symbolic endorsements.

ARGUMENT

I. Creation of the Kiryas Joel Village School District Was Unconstitutional Because It Deliberately Combined Religious and Governmental Power.

Amici entirely agree with parts I, II, and III of the Brief of the American Jewish Congress *et al.* as Amici Curiae; we adopt parts I, II, and III of that brief by reference. This case involves a deliberate and successful effort to confer governmental power on a religious community, and the resulting combination of religious and governmental power violates the core of the Establishment Clause. This point is dispositive of the case; we will not burden the Court by restating it here in different words.

II. Affirmance Here Would Not Preclude Accommodation of the Needs of the Disabled Children of Kiryas Joel.

The Satmar Hasidim's legitimate need for accommodation can be fully met under this Court's cases by providing publicly funded services for disabled children at a site off the campus of the Satmar's private religious school. On this point, we adopt by reference part VI of the brief of the American Jewish Congress.

III. The *Schempp-Lemon* Test and the Endorsement Test Are Sound in Principle. They Would Be Improved by Clarifying Their Details.

Instead of a straightforward analysis based on the combination of religious and governmental power, the New York Court of Appeals relied on the second prong of the *Lemon* test and on the endorsement test. *Grumet v. Board of Education*, 618 N.E.2d 94, 99 (N.Y. 1993). The Court of Appeals' analysis is neither necessary nor helpful in this case.

All three petitioners read the Court of Appeals to hold that government advances and endorses religion any time it accommodates the needs of religious minorities. To the extent that the opinions below are susceptible of that reading, they are wrong. Despite some language that tends toward such conclusions, we do not think that is what the opinions below held. The Court of Appeals recognized that the Satmars are entitled to publicly funded services for their disabled children on sites away from the campus of their private religious schools. It is therefore obvious that the Court of Appeals does not think that all accommodations are unconstitutional. Rather, the Court of Appeals held that New York had conferred benefits that go far beyond restoring disabled Satmar children to equal participation in programs for the disabled. Benefits not necessary to accommodation cannot be justified as accommodation; they are likely to be an establishment.

The opinions below and the petitioners' briefs highlight a continuing source of confusion in the *Schempp-Lemon* test and in the endorsement test. We believe that the basic principle underlying these tests is sound; the confusion comes from ambiguities in the details of the

Schempp-Lemon formulation of the test and from uncertainty about the scope of the endorsement test. This case, involving a violation of the fundamental rule against combining religious and governmental power, presents no occasion to fine tune the language of doctrinal formulations. But if the Court chooses to address the *Schempp-Lemon* test in this case, it should recognize that nothing more than fine tuning is required.

A. The *Schempp-Lemon* Test

The Court of Appeals relied on the second prong of the *Lemon* test: that the statute's principal or primary effect must neither advance nor inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). This part of *Lemon* was taken almost verbatim from *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). The Court in *Schempp* explicitly offered the test as an elaboration of "the wholesome 'neutrality' of which this Court's cases speak." *Id.* Government was not to depart from neutrality in either direction; it was neither to advance nor inhibit religion.

The *Schempp-Lemon* formulation of the neutrality requirement has had unintended consequences. The *Schempp-Lemon* formulation can be read to disaggregate the search for the most nearly neutral course into two separate inquiries: Has government advanced religion? And, has government inhibited religion? It is possible to ask these two questions separately, and it is therefore possible to ask either without asking the other. And so by an inadvertent linguistic substitution, many lower courts now ask whether government has advanced religion, instead of asking whether government has departed from neutrality.

This disaggregation of the neutrality inquiry is a mistake:

> Because absolute zero is not achievable, it is always possible to find some effect of advancing or inhibiting religion. Thus, if you look at only one side of the balance, you can always find a constitutional violation. . . .
>
> Substantive neutrality always requires that the encouragement of one policy be compared to the discouragement of alternative policies. . . . By disaggregating neutrality, the Court has lost sight of its original objective.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1007-08 (1990).

The basic point is clearly illustrated in this case. Because of their religious beliefs and practices, Satmar children are unable to attend a public school with other children. Some of these Satmar children also have disabilities, and they are entitled to publicly funded services for the disabled under programs administered through schools. There is thus an unavoidable conflict between the practices of the non-Satmar majority and the Satmar minority. What is the most nearly neutral government response to this conflict?

One possibility is to provide publicly funded services to the disabled Satmar children at a site where they can participate, separated from the other children. Considered in isolation, this might be thought to advance

Satmar Hasidism. But this possibility cannot be considered in isolation; it must be compared to the alternative. The alternative is to tell Satmar children that they cannot get publicly funded services for the disabled unless they give up core practices of their faith. This would plainly inhibit Satmar Hasidism. Moreover, the inhibiting effect of withholding services from disabled children would far exceed the advancing effect of providing those services at a site away from the main campus of the public school.

Thinking about the incentives created by each alternative makes clear which alternative would be the greater departure from neutrality. It is almost impossible to imagine non-believers converting to Satmar Hasidism in order to send their disabled child to a different building. If public services are available to disabled children of all faiths, the way in which the services are delivered creates no incentive to change faiths. But it is easy to imagine parents abandoning Satmar Hasidism, or relaxing their family's observance of the faith, if that is the only way to get an education for their disabled child. Withholding services from the disabled would place enormous governmental pressure on religious choices, penalizing the religious choices of those who adhere to the faith, and successfully coercing the religious choices of those who succumb to the government's pressure. It is far more nearly neutral to provide the services at a separate site than to provide them in such a way that families must abandon the practice of their faith in order to participate.

Another useful way to clarify the choice between these two alternatives is this: Providing services for disabled children in a way that enables the Satmar to participate removes a burden from the practice of Satmar Hasidism. But removal of the burden is relevant only to

those who are already attracted to the faith. Unlike government prayers or religious observances, removing a burden cannot motivate anyone to be attracted to the burdened faith in the first place. But imposing a burden can motivate people to leave the faith, and it can penalize them for staying in. It is usually more nearly neutral to remove burdens than to impose them.

The standard applied in the foregoing analysis is that the goal of government neutrality toward religion should be to minimize government influence on religious choices. Scholars on both sides of this case have agreed on that basic standard. "[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Laycock, *supra*, 39 DePaul L. Rev. at 1001. "Government is not free to promote or discourage [religion]. . . . Effects on religious practice must be minimized . . ." Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 14 (1989).

This underlying principle of neutrality toward religion is sound, and it is well-established in the opinions of this Court. The neutrality principle is violated here by the permanent alliance of religion and government in the Kiryas Joel Village School District. New York has not merely lifted a burden from the Satmar; it has not merely found a means to provide equal access to public services for their disabled children. New York has conferred on the Satmar all the governmental power of a New York school district: power to tax, to regulate teachers and students, to establish curriculum, even power to close the public schools. All these powers have been used: the district has no public school for children who are not

disabled. *Cf. Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

Even before these powers were used, creation of a separate political entity on religious lines had immediate and permanent effects, powerfully reinforcing private choices with the coercive powers of government. Private choice had created merely a group of Satmar living in close proximity. The boundary of their neighborhood was free to ebb and flow under the cumulative effect of private choices about religion and about real estate. It was the State of New York that fixed the boundary by law. A decision to buy or rent a home on one or the other side of the line now has dramatic legal and political consequences for the buyer -- consequences that did not attach to the informal edges of a neighborhood. To move into Kiryas Joel is not merely to acquire Satmar neighbors, but to submit to Satmar government. Fixing the boundary by law and allocating governmental power on either side of the boundary made the boundary permanent and coercive.[1]

Neither the *Schempp-Lemon* test nor the language of neutrality is needed to explain what is wrong with combining religious and governmental power in these ways. But the more direct analysis of the case in the Brief of the American Jewish Congress is entirely consistent with both the neutrality standard in general and with the *Schempp-Lemon* formulation in particular. Conferring governmental power on the Satmar Hasidim establishes

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[1] Similar but not identical analysis applies to the Village of Kiryas Joel, which was created by a quite different procedure. That issue is not before the Court.

their religion; providing services to their disabled children would not.

What is needed is not to overrule the *Schempp-Lemon* test, but to clarify it. This Court has never understood the *Schempp-Lemon* test to require discrimination against religion or to preclude government from lifting regulatory burdens on religion. Under this Court's cases, religious minorities may be exempted from burdensome regulation, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), receive social services on an equal basis with other citizens, *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), participate on an equal basis in the institutional delivery of social services, *Bowen v. Kendrick*, 487 U.S. 589 (1988), *Bradfield v. Roberts*, 175 U.S. 291 (1899), and speak in public places on an equal basis with other speakers, *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), *Board of Education v. Mergens*, 496 U.S. 226 (1990), *Widmar v. Vincent*, 454 U.S. 263 (1981).

It is only the unintended ambiguity of the *Schempp-Lemon* formulation that has led some advocates and lower courts to think that the Constitution requires or permits discrimination against religion. The Court would do well to clarify that the inquiry into advancement can never be separated from the inquiry into inhibition -- that these are inseparable components of a single inquiry into neutrality.

B. The Endorsement Test

The endorsement test is not relevant here. The proper domain of the endorsement test is government speech and symbolic conduct. It is no accident that the endorsement test originated in a creche case, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), and that the Court has applied it principally in cases involving speech or religious observance. *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (moments of silence); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (curriculum); *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94, 601 (1989) (religious displays); *see also Lee v. Weisman*, 112 S. Ct. 2649, 2664 (1992) (Blackmun, J., concurring) (school prayer); *id.* at 2676 (Souter, J., concurring).

Government speech or symbolic conduct violates the Establishment Clause if it endorses a position for or against religion in general or for or against one religion in particular. When government merely speaks, the communicative and symbolic impact is dominant with respect to both the constitutional costs and the alleged majoritarian benefits. Tangible consequences are secondary and attenuated or even absent altogether. When the government is engaged only in religious speech or symbolic religious conduct, the endorsement test goes to the heart of the matter. It is a way of explaining that when government deliberately takes positions on religious issues, coercion is superfluous.

At first the endorsement test also seemed to be a helpful way of reducing the ambiguities of the *Schempp-Lemon* formulation of neutrality: endorsement was a way of explaining that it is not a forbidden advancement of religion to exempt conscientious objectors or otherwise

remove burdens from religious practice. *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring). But the opinion below demonstrates that the endorsement test can aggravate those ambiguities rather than solve them.

This case demonstrates that it is both unnecessary and misleading to focus on symbolism when government action has more tangible consequences and is directed at more tangible problems. When government uses its coercive powers to tax or regulate, or when it gives money to religious entities, or where as here it confers on a religious community the power to tax, spend, and regulate, then the focus should be on the actual purpose and effect of what the government has done. If the tangible effects of the government's acts depart from neutrality, there is a prima facie violation of the Religion Clauses, and it adds nothing to speak of endorsement. Conversely, if the tangible effects of what the government has done come as close to neutrality as the circumstances permit, government has not endorsed religion, and it is a mistake to inquire separately whether it has done so by implication.

If a reasonable observer fully understands the government's program and realizes that it is neutral, then that observer will not perceive an endorsement, and the endorsement test will have added nothing to the analysis of tangible consequences. On the other hand, if the reasonable observer perceives an endorsement even though the government's program comes as close to neutrality as circumstances permit -- even though government has done everything possible to minimize its influence on religious choices -- then the reasonable observer is simply mistaken (or unreasonable after all), and constitutional analysis should not be held hostage to

his mistake. Put another way, the observer's perception of implicit endorsement in a neutral policy will always be a smaller departure from neutrality than the tangible incentives or disincentives of alternative policies.

Talk of a "symbolic union" of church and state is irrelevant and misleading for similar reasons. The problem in this case is not a symbolic union, but a real union. The law creating the Kiryas Joel Village School District is unconstitutional not because of what it symbolizes, but because of what it does: it actually confers governmental power on an entity defined by religion. Symbolism does not compound the violation; and if there were no violation, symbolism would not create one. The New York legislation in this case was an attempt to solve a difficult problem, and the legislature would have been criticized no matter what it did. It is enough for the legislature to enact the most neutral solution available, without having to worry whether its critics might perceive symbolism or implied endorsements.

This Court extended the endorsement test beyond government speech and symbolic conduct in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 389-90 (1985). The Court found an implicit endorsement in state funded courses on the campus of religious schools. This extension of the endorsement test was unnecessary to the result, which was adequately explained by other rationales set out in the same opinion. Most important, there was nothing in the structure of the Grand Rapids program to keep it from expanding until it supplanted all or part of the core curriculum, thus enabling government to pay for the core educational functions of a religious school. *Id.* at 396-97. *See also id.* at 385-89 (fear of state-sponsored religious indoctrination). These other rationales rested on a long line of this Court's cases. Talk of implied

endorsement and symbolic union was dictum, transferring a new formulation from the government speech cases to a novel context.

Experience has shown that it was misleading to transfer this doctrine beyond its natural scope. It can be abandoned without calling *Grand Rapids* into question. Indeed, the Court rejected an argument based on a symbolic "link" in *Bowen v. Kendrick*, 487 U.S. 589, 613 (1988), on the ground that it reached much too far. Critics can find a symbolic link or union in any cooperation between church and state, even in the provision of services to disabled children. Fears of merely symbolic unions would thus call in question every one of the cases cited at page 12 of this brief; taken seriously, such arguments would require discrimination against religious citizens. All that remains is to acknowledge that *Bowen* ended the mistaken extension of the endorsement and symbolic-union tests to cases involving tangible government programs. These arguments should be reserved for government speech about religion.

CONCLUSION

For the reasons stated in parts I, II, III, and VI of the brief of the American Jewish Congress, the judgment should be affirmed. This judgment would not and should not preclude special education services to the disabled children of Kiryas Joel.

Affirmance need not entail reconsideration of either the *Schempp-Lemon* test or the endorsement test. But if those tests are to be reconsidered, only minor clarifications are needed. The essence of those tests is the constitutional commitment that government should be

neutral towards religion. That commitment must be preserved. But that commitment does not preclude removing burdens from religious minorities, and it does not require speculation about implicit endorsement in otherwise neutral government programs. Rather, the commitment to neutrality is best understood as minimizing the influence of government on private religious choices.

Respectfully submitted,

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